IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 310

IN THE MATTER OF
GRANADA APARTMENTS, INC.,
Debtor.

WEIGHTSTILL WOODS, COURT TRUSTEE,
Petitioner,

vs.

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AND OTHERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AN OPINION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT UPON APPEAL 7061 FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

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MOTION BY THE COURT TRUSTEE FOR LEAVE TO FILE HIS PETITION FOR REHEARING ENTITLED: "MOTION TO RECONSIDER PETITION FOR CERTIORARI, TO REVERSE AND REMAND UPON AUTHORITY OF OPINION NOS. 281-282 FILED FEBRUARY 3, 1941."

To the Honorable, the Justices of the Supreme Court:

The Court Trustee respectfully makes motion for leave to file a petition for rehearing at the same term, but after the expiration of the 25 days provided for by the rules of

this court. The special circumstances are set forth as suggestions in support of this motion, and as suggestions in support of such petition for rehearing which is presented herewith in printed form entitled: "Motion to reconsider petition for certiorari, to reverse and remand upon authority of opinion Nos. 281-282 filed February 3, 1941."

Motion is also made to vacate the order dated November 14, 1940, which denied the petition for writ of certiorari, now sought to be reviewed and granted, in this No. 310: and thereupon to consider the petition and record, and to order such relief to Debtor Estate as Your Honors may deem appropriate.

Respectfully submitted,

WEIGHTSTILL WOODS, Court Trustee,
Petitioner.

SUGGESTIONS IN SUPPORT OF MOTION BY THE COURT TRUSTEE FOR LEAVE TO FILE HIS PETITION FOR REHEARING.

Nos. 281, 282 and 310 Are Only One Case.

The petitions for certiorari in Nos. 281, 282 and 310 were presented for the purpose of reviewing *one* opinion by the Circuit Court of Appeals [1] which had reviewed *one* decree by the District Court,[2] which was based upon one set of findings of fact and conclusions of law.[3] Behind these findings, this decree and this opinion are *one* set of pleadings common to the case which on appeal was given three case numbers. There was *one* record in the District Court, and by order of consolidation there was but *one* record in the Circuit Court of Appeals. All appeals proceeded from *one* hearing common to all pleadings, issues and claims. *One* petition for rehearing was filed in the Circuit Court of Appeals.[4] The case was, on appeal, given three numerical designations (1) because respondents took one appeal by leave of the Circuit Court of Appeals (case 6986 and 281) and one appeal as of right (case 7060 and 282), and (2) because the Court Trustee took an appeal (case 7061 and 310) to enlarge the relief to the debtor estate, pursuant to the primary findings of fact in the record.

The Court Trustee sought to have these three appeals docketed as one case in the Circuit Court of Appeals in the summer of 1939; but after extensive inquiry and some correspondence with the Committee which prepared the rules, and conferences with the Clerk of the Circuit Court of Ap-

1. 111 Fed. (2d) 834; See Printed Record in case No. 310 at pp. 144-159 and Printed Record in cases Nos. 281-282 at pp. 955-969.

2. Entered on May 2, 1939. See PR. in No. 310 at pp. 43-44 and PR. in 281-282 at pp. 794-795.

3. No. 310 PR. 18-42 and Nos. 281-282 PR. 769-793 as made on May 2, 1939.

4. See PR. in No. 310 at 160-172 and PR. in Nos. 281-282 at 975-990.

peals, it appeared that the new Rules of Civil Procedure do not govern the matter, and that multiple docketing for each appeal separately, is a required practice before the Circuit Court of Appeals for the Seventh Circuit.

Rule 75K of Civil Procedure provides for one record for all appeals from one decree. But the matter of docketing in courts of review is not so governed, but follows former practice. Thus the sole reason for having three separate numbers for appeals was not any matter of substance but was one of docketing and practice before the Circuit Court of Appeals. On coming to this court the practice requires a separate docketing by the Clerk of this court for each docket number in the Circuit Court of Appeals.

The Opinion in Cases 281-282.

Three petitions for certiorari were filed before Your Honors by the petitioner to the present term of court. The petition in cases. 281-282 (6986 and 7060 below) was granted on October 14th last.[5] The petition in case 310 (7061 below) was at the same time denied.[6] On February 3rd last, Your Honors delivered the opinion of the Court in cases 281-282.[7] Then for the first time, (which was more than 25 days [8] after the petition for a writ of certiorari in case No. 310 had been denied) the reason of Your Honors in so granting certiorari in cases 281-282 became known to this petitioner.

It then appeared by that opinion that Your Honors had granted certiorari because it involved

> "the power of the District Court in proceedings under Chapter X of the Chandler Act * * * to disallow

5. PR. 1038 and 311 U. S. X. preliminary print.

6. 311 U. S. XXII. preliminary print.

7. 311 U. S. ....., 61 S. Ct. 494-495, 85 L. Ed. 478.

8. Time specified in Rule 33 of the Supreme Court for filing Petition for Rehearing as of right.

> claims for compensation and reimbursement on the grounds that the claimants were serving dual or conflicting interests."[9]

This petitioner urges that the same basic question relating to the *Congressionally endowed powers and duties of the District Court,* is presented by the corollary petition for certiorari in case No. 310. Since the basic question is the same as in cases 281-282, the corollary answer to the question should also be the same.

Diligence by Petitioner.

This application is made as soon as preparation could be made, after Your Honors on March 10, 1941 have denied the petition for rehearing in Nos. 281-282, which was presented by City National Bank and other respondents, wherein they sought to review your opinion filed February 3, 1941. Unless this present motion is granted by Your Honors, opposing counsel may argue hereafter in the District Court, that your opinion in Nos. 281-282 should be applied with some limitations, because proceeding No. 310 remains unreversed. To enforce freely your Opinion and Decree by further proceedings hereafter in the District Court, your Court Trustee urges that a reversal in No. 310 may be deemed by Your Honors a necessary and desirable procedure.

Precedents for This Application.

Since the record facts are the same, No. 310 may be disposed of without a new argument, on the basis of said opinion in 281-282 delivered for Your Honors by Mr. Justice Douglas on February 3rd last. The practice by this court of allowing certiorari and reversing and remanding upon authority of an opinion filed in a related appeal heard on certiorari, has been used at this term of court as is illustrated by the *Prudence Securities Advisory group of cases*

9. Your Honors' opinion at 61 S. Ct. 494-495, 85 L. Ed. 480.

that were so disposed of on January 13, 1941. (Cases Nos. 210, 211, 214, 259, 273 and 284 decided on the basis of case No. 69.)

THE BASIC FACT SITUATION.

In the opinion filed February 3, 1941. Your Honors sustained the basic contentions made by the Court Trustee in this matter; namely, Your Honors ruled that there was *multiple representation of conflicting interests by all the fiduciaries,* which fact authorized the District Court to disallow fees and expenses other than such actual expense outlays as might be proven to have been incurred *exclusively* for the benefit of the Granada Estate.

In the District Court, in 1937 not only were additional fees sought by the respondents from the Granada Estate (which this Court and the District Court have disallowed), but that Court was asked to approve an accounting which showed the retention of Granada funds, for fee credits and other cash credits *claimed* by City National Bank and Trust Company. The pleadings by City National admitting this fact are in the record.[10] Even if the Court Trustee had not filed a counterclaim, that voluntary request for the approval of the accounts submitted by City National, raised the question whether City National is indebted to the Granada estate. City National by filing these voluntary pleadings, invested the District Court with the *duty to determine the extent* to which the respondents are indebted to the estate by their management or mismanagement thereof, as shown by the items they have set forth, and which the District Court has found.

Your Honors' opinion re 281-282 confirms and establishes all primary fact findings as made by the District Court. To reverse the Circuit Court of Appeals and to restore the action by the District Court as to those mat-

10. PR. 111-126, 165-169 in cases 281-282, pages 13 and 14 of petition for writ of certiorari.

ters, and not to reverse No. 310, will becloud some administrative problems on final hearing before the District Court. As yet no action has been taken in the District Court upon the rulings made by this court in Nos. 281-282 or 310.

The Basic Rule of Law.

The ruling made by this Court in its opinion 281-282 filed February 3, 1941, clearly requires that the request by the respondents that they may retain the sums they claim as fees and otherwise, should be denied and that City National should be surcharged therewith, and should be ordered by the District Court, to return all such funds to the estate and to the Court Trustee, because respondents had acted in conflicting capacities in performing services for which City National claims a right to deduct these moneys from the estate as their fees and otherwise. In this connection these questions are presented under Section 2(a) 21 of the Chandler Act (see page 3 of petition for certiorari):

I.

DOES A FEDERAL BANKRUPTCY REORGANIZATION COURT HAVE THE **AUTHORITY** UNDER CHAPTER TWO, SECTION 2 (a) (21), OR OTHERWISE, IN AN ACCOUNTING MADE VOLUNTARILY BEFORE IT BY AN INDENTURE TRUSTEE IN POSSESSION PRIOR TO THE FEDERAL REORGANIZATION PROCEEDINGS, TO SURCHARGE SUCH TRUSTEE WITH THE AMOUNT OF DISBURSEMENTS CLAIMED AS FEES, AND OTHERWISE, BUT NOT SUPPORTED BY SHOWING OF EXCLUSIVE BENEFIT TO THE TRUST?

II.

DOES A FEDERAL BANKRUPTCY REORGANIZATION COURT HAVE THE **DUTY** UNDER CHAPTER TWO, SECTION 2 (a) (21), OR OTHERWISE, IN AN ACCOUNTING MADE VOLUNTARILY BEFORE IT BY AN INDENTURE TRUSTEE IN POSSESSION PRIOR TO THE FEDERAL REORGANIZATION PROCEEDINGS, TO SURCHARGE SUCH TRUSTEE WITH THE AMOUNT OF DISBURSEMENTS CLAIMED AS FEES, AND OTHERWISE, BUT NOT SUPPORTED BY SHOWING OF EXCLUSIVE BENEFIT TO THE TRUST?

These questions will be discussed together.

The Facts as Stated in the Opinion by the Circuit Court of Appeals.

The claim for disbursements by City National, was discussed by the opinion of the Circuit Court of Appeals as follows:[11]

> "Subsequent to the approval of a plan of reorganization, submitted by the committee, City National, on September 14, 1937, filed its proof of claim in the amount of $10,899.90, alleging said indebtedness was established by decree of the Superior Court of Cook County, Illinois, entered December 18, 1936, is a certain foreclosure proceeding, in which City National was complainant and the debter corporation, defendant. The itemized statement of the claim as fixed and allowed by the Superior Court, was as follows: Fees of City National as Trustee, $2,570; solicitor's fees for City National $8,250; and court reporter's fees, $39.90. At the time the debtor's property was turned over to the Court Trustee, the City National had in its possession the sum of $1,608.56, *which it applied to its claim, thereby reducing the same to the sum of* $9,241.34, *as shown by the amended claim.* August 30, 1937, City National filed a report of its stewardship as trustee, and on September 9, 1937, the Court Trustee filed objections to the report and claim as filed by City National. Thus are raised the more important issues of the case. The objections are in the nature of a *counterclaim* charging divers acts of mismanagement and *asserting that City National was entitled to no compensation either for itself or its attorneys.* Answer was filed to this counterclaim, denying specifically its numerous allegations." (Italics supplied.)

11. PR. 956-957 in cases 281-282 and PR. 145-146 in case 310.

THE FINDINGS OF THE TRIAL COURT.

After hearing the accounting, the trial court ruled that City National should be surcharged for *cash* withheld from Court Trustee because:

> "3. City National without making a substantial adverse claim, refused to pay over cash funds pursuant to court order and demand made by the Court Trustee, May, 1937—$1,990.86."[12]

By Your Honors' opinion of February 3rd last, in cases 281-282, it appears that City National not only has no proper defense but has disentitled itself to the credits claimed by reason of its representation of adverse interests. This ruling substantially confirms the finding by the trial court that:

> "A continuance of said representation at all times was a breach of trust which alone disentitles counsel or committee or City National to *any* compensation for services to Granada." (Finding 42, PR. 33.)

and that,

> "The breach of confidence thus in evidence is so fundamental as to destroy all right for *any* of these parties to have compensation or reimbursement for *any services.*" (Finding 50, PR. 37.)

After these specific findings of money due from City National (310 PR. p. 38 and 281-282 PR. 789), the District Court made a conclusion as follows:

> "54. Without need for repetition here in detail, the truth of all matters stated in answer and counterclaim by Court Trustee filed September 9, 1937, is fully established by evidence in the record. The Court Trustee has fully proven the substance of all matters claimed in his pleadings and herein enumerated, and Debtor estate is entitled to full relief for the wrongs asserted and proven of record. All the items claimed as credits by City National should be falsified, disallowed and ordered paid to Court Trustee with reasonable interest." (PR. 38.)

12. Finding 55, PR. 789 in cases 281-282 and PR. 38 in case 310. See petition for certiorari at pp. 9-11.

THE RULING OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals said that the matter was *res adjudicata* by reason of the state court decree. The Court of Appeals said:[13]

> "Item III, in the amount of $1,990,86, includes a number of items, the largest of which is $1,608.56. In the proceeding in the Superior Court of Cook County, referred to heretofore, an accounting was had between City National and the debtor. By the decree entered in that court December 18, 1936, the account was *adjudicated,*[14] and the City National was expressly authorized to apply said sum upon the indebtedness due it. It appears to be the position of the Court Trustee that the order of the Superior Court was void. We conclude to the contrary and, that City National properly applied this amount to its claim as authorized by the court."

Thus the *power* of the District Court to require an accounting by fiduciaries despite a prior court decree, and the turnover of all assets of the debtor was challenged and denied by the Circuit Court of Appeals. The opinion by Your Honors in 281-282 lays down a principle which rules to the contrary.

The Circuit Court of Appeals ignored the pleading by respondents which waived any question of *res adjudicata,* also ignored the ruling by Your Honors in the *Los Angeles Lumber Company case,* and also ignored the oral waiver made by counsel for respondents in that court, which oral waiver was repeated in this court upon the oral argument. The Circuit Court of Appeals also ignored the plain language of the Chandler Act which the District Court had applied to the proceedings. Respondents did not in the Circuit Court of Appeals attack the finding of the District Court that the application of the Chandler Act was practicable and had been validly made. (PR. 42, 44.)

13. PR. 960 in case 281-282 and PR. 149 in case 310.

14. Italics supplied.

THE CHANDLER ACT.

Section 2 (a) (21) of Chapter Two of the Bankruptcy Act in part provides that the bankruptcy court may:

> (1) Require receivers and trustees not appointed under the Bankruptcy Act to turn over all property of the debtor to the Court Trustee;
>
> (2) Require an accounting by such former trustee and re-examine the propriety of all disbursements made out of such property and unless such disbursements have been approved by a court of competent jurisdiction *upon notice to creditors and other parties in interest,* may surcharge such trustee with the amount of any improper disbursement.[15]

The opinion by the Circuit Court of Appeals does not suggest that any "notice to creditors and other parties in interest" was ever given by City National in the Superior Court proceedings. Likewise the record of the proceedings in the District Court does not suggest such notice. Respondents never testified upon or offered to prove [although the court trustee demanded that proof (PR. 100)] this primary fact. In the absence of even an assertion that the Superior Court proceedings were solemnized by notice to creditors and others, the Circuit Court of Appeals ruled that the District Court, despite Chapter II, Section 2 (a) (21) of the Bankruptcy Act, had no jurisdiction of the accounting, because state court ruling is *res adjudicata.* Petitioner submits that:

> (1) *The power, jurisdiction and duty of a bankruptcy Court* to demand an accounting from former fiduciaries of the debtor presents a question of very great and real importance if the efficient administration of debtor's estates under the Federal Bankruptcy law is to be effected, and
>
> (2) That the present interpretation of Section 2 (a) (21) of Chapter II, of the Bankruptcy Act by the Circuit Court of Appeals for the Seventh Circuit is er-

15. The complete text of this subsection of the Bankruptcy Act is set forth in Appendix "A". Also see page 3 of petition for certiorari.

> roneous and will result in the failure of bankruptcy courts to assert their *statutory and inherent powers and duties of jurisdiction* with the result that efficient administration and collection of debtors' property will be greatly jeopardized.

Thus not only is the authority and power of the District Bankruptcy Court at issue but also its duty, as defined by the Congress, has been denied by the ruling made by the Circuit Court of Appeals.

Unless this present motion is granted by Your Honors, opposing counsel may argue hereafter in the District Court, that your opinion in Nos. 281-282 should be applied with some limitations, because of proceeding No. 310.

Recently in the case of *Bowman* v. *Lopereno, et al.*, No. 69, at this term, 61 S. C. R. 201, Your Honors recognized the flexible nature of rules as to time allotted for petition for rehearing.

To leave 310 unreversed creates an anomalous situation which may cause confusion and embarrassment to final administration of the Debtor Estate, when the mandate of this Court is returned to the District Court. Reversal of 310 will remove cause for doubt about the meaning of the directions given by this Court to the District Court by the Opinion in Nos. 281-282.

For these important reasons this petitioner suggests that Your Honors grant him leave to file his motion and petition now presented to reconsider the petition for certiorari as heretofore filed in case 310.

Respectfully submitted,

WEIGHTSTILL WOODS,
Counsel for Petitioner.